

House Study Bill 544

HOUSE FILE _____
BY (PROPOSED COMMITTEE ON
JUDICIARY BILL BY
CHAIRPERSON SWAIM)

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

1 An Act relating to business corporations, by providing for
2 distributions and business opportunities.
3 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
4 TLSB 5667HC 82
5 da/nh/8

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1 1 Section 1. Section 490.640, subsection 7, Code 2007, is
1 2 amended to read as follows:
1 3 7. Indebtedness of a corporation, including indebtedness
1 4 issued as a distribution, is not considered a liability for
1 5 purposes of determinations under subsection 1 if its terms
1 6 provide that payment of principal and interest are made only
1 7 if and to the extent that payment of a distribution to
1 8 shareholders could then be made under this section. If the
1 9 indebtedness is issued as a distribution, each payment of
1 10 principal or interest is treated as a distribution, the effect
1 11 of which is measured on the date the payment is actually made.

1 12 8. This section shall not apply to distributions in
1 13 liquidation under division XIV.

1 14 Sec. 2. Section 490.831, subsection 1, paragraph a, Code
1 15 2007, is amended to read as follows:

1 16 a. That any of the following apply:

1 17 (1) A provision in the articles of incorporation
1 18 authorized by section 490.202, subsection 2, paragraph "d", or
1 19 the protection afforded by section 490.832 if interposed as a
1 20 bar to the proceeding by the director, does not preclude
1 21 liability.

1 22 (2) The protection afforded by section 490.870 precludes
1 23 liability.

1 24 Sec. 3. NEW SECTION. 490.870 BUSINESS OPPORTUNITIES.

1 25 1. A director's taking advantage, directly or indirectly,
1 26 of a business opportunity may not be the subject of equitable
1 27 relief, or give rise to an award of damages or other sanctions
1 28 against the director, in a proceeding by or in the right of
1 29 the corporation on the ground that such opportunity should
1 30 have first been offered to the corporation, if before becoming
1 31 legally obligated respecting the opportunity the director
1 32 brings it to the attention of the corporation and any of the
1 33 following apply:

1 34 a. Action by qualified directors disclaiming the
1 35 corporation's interest in the opportunity is taken in
2 1 compliance with the procedures set forth in section 490.832,
2 2 as if the decision being made concerned a director's
2 3 conflicting interest transaction.

2 4 b. Shareholders' action disclaiming the corporation's
2 5 interest in the opportunity is taken in compliance with the
2 6 procedure set forth in section 490.832, as if the decision
2 7 being made concerned a director's conflicting interest
2 8 transaction; except that, rather than making the disclosure as
2 9 required in section 490.832, in each case the director shall
2 10 have made prior disclosure to those acting on behalf of the
2 11 corporation of all materials facts concerning the business
2 12 opportunity that are then known to the director.

2 13 2. In any proceeding seeking equitable relief or other
2 14 remedy based upon an alleged improper taking advantage of a
2 15 business opportunity by a director, the fact that the director
2 16 did not employ the procedure described in subsection 1 before
2 17 taking advantage of the opportunity shall not create an
2 18 inference that the opportunity should have been first

2 19 presented to the corporation or alter the burden of proof
2 20 otherwise applicable to establish that the director breached a
2 21 duty to the corporation in the circumstances.

2 22 EXPLANATION

2 23 This bill amends the "Iowa Business Corporation Act" which
2 24 governs for-profit corporations and is based on the model Act
2 25 promulgated by the American bar association. The bill's
2 26 provisions reflect the language of the model Act.

2 27 DISTRIBUTIONS INVOLVING INDEBTEDNESS. The bill amends Code
2 28 section 490.640, to provide that indebtedness need not be
2 29 accounted for as a liability when determining whether a
2 30 corporation may provide for a distribution. Otherwise, Code
2 31 section 490.640(3) could restrict a distribution because it
2 32 requires as a prerequisite to distribution that the
2 33 corporation must be able to pay its debts as they become due
2 34 in the usual course of business and the corporation's total
2 35 assets must be more than its total liabilities.

3 1 BUSINESS OPPORTUNITY == SAFE HARBOR. The bill creates new
3 2 Code section 490.870, based on the model Act's Code section
3 3 8.70, which applies to the director of a corporation's board
3 4 of directors. A director may profit from a transaction (a
3 5 business opportunity) at the expense of the corporation which
3 6 may also profit from the transaction. The common law doctrine
3 7 of corporate opportunity recognizes the director's fiduciary
3 8 duty to the corporation, and provides that the director must
3 9 be prepared to sacrifice a profit by offering the corporation
3 10 the first chance to engage in the transaction. The bill
3 11 provides the director with a so-called "safe harbor" from
3 12 liability for taking advantage of the business opportunity if
3 13 the director discloses it to the board (or a committee of the
3 14 board) or to the shareholders in the same manner as if the
3 15 director were disclosing a conflict of interest under Code
3 16 section 490.832. The bill departs from the model Act in one
3 17 respect. Code section 490.870 substitutes references to
3 18 conflict of interest provisions in Code section 490.832 in
3 19 lieu of other conflict of interest provisions in the model
3 20 Act, which Iowa has not enacted.

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